

**STATE OF MICHIGAN
SUPREME COURT**

**APPEAL FROM THE MICHIGAN COURT OF APPEALS
JUDGES, PAT M. DONOFRIO, P.J., JANE E. MARKEY and DONALD S. OWENS**

SAL-MAR ROYAL VILLAGE LLC,

Plaintiff/ Appellee,

-vs-

Supreme Court No. 147384

Court of Appeals No. 308659

Lower Court No. 2011-004061-AW

MACOMB COUNTY TREASURER,

Defendant/ Appellant.

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**APPELLANT, MACOMB COUNTY TREASURER'S
BRIEF ON APPEAL**

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

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STATEMENT OF JURISDICTION

On April 23, 2014 this Court granted Defendant's application for leave to appeal Court of Appeals May 30, 2013 Opinion as supplemented on remand on February 25, 2014. This Court has jurisdiction to consider this matter pursuant to MCR 7.301(A)(2).

STATEMENT OF QUESTIONS INVOLVED

1. WHETHER THE COURT OF APPEALS ERRED IN DETERMINING THAT INTEREST AND ADMINISTRATIVE FEES FOR DELINQUENT TAXES ASSESSED PURSUANT TO MCL 211.78a(3) CAN BE WAIVED IN A MICHIGAN TAX TRIBUNAL PROCEEDING WHERE THE COUNTY TREASURER WAS NOT A PARTY?

The Court of Appeals answered "No".

Defendant contends the answer is "Yes".

Plaintiff contends the answer is "No".

2. WHETHER THE COURT OF APPEALS ERRED IN FINDING THAT THE MACOMB COUNTY TREASURER WAS IN PRIVITY WITH MACOMB TOWNSHIP FOR PURPOSES OF WAIVING INTEREST AND FEES UNDER MCL 211.78a(3)?

The Court of Appeals answered "No".

Defendant contends the answer is "Yes".

Plaintiff contends the answer is "No".

3. WHETHER PLAINTIFF'S CLAIM FOR RELIEF FALLS UNDER THE EXCLUSIVE JURISDICTION OF THE TAX TRIBUNAL PURSUANT TO MCL 205.731?

The Court of Appeals answered "No".

Defendant contends the answer is "Yes".

Plaintiff contends the answer is "No".

STATEMENT OF FACTS AND PROCEEDINGS

Defendant, the Macomb County Treasurer, appeals by leave granted from the Court of Appeals Opinion and Order, *Sal Mar Royal Village LLC v Macomb County Treasurer*, 301 Mich App 234; 836 NW2d 236 (2013), (118a), as supplemented on remand, ___ Mich App ___; ___ NW2d ___ (docket no. 308659, February 25, 2014). (124a).

This case involves a dispute regarding interest mandated by MCL 211.78a(3) on four years of delinquent taxes on property owned by Plaintiff. Plaintiff is a property development company. On November 16, 2006, Plaintiff purchased the subject property, approximately 9 acres of vacant land in Macomb Township at the northwest corner of Hall Road and Heydenreich, for \$2,825,000. (40a). Approximately six months later, on May 31, 2007, Plaintiff filed an appeal with the Michigan Tax Tribunal contesting the 2007 tax assessment on the property, docket number 337013. (69a). Plaintiff named Macomb Township as the respondent in the tax appeal. Plaintiff and Macomb Township were the only parties to the tax appeal. In Paragraph 5 of the Petition, Plaintiff alleged that the value of the property was \$1,708,000 as of December 31, 2006 and requested that the assessment be lowered. (70a). David Marmon, Plaintiff's current counsel, represented Plaintiff in the tax appeal. Lawrence W. Dloski represented Macomb Township. (tr. 1/30/12 p 28) (111a). Plaintiff's tax appeal was amended to include the tax assessments for 2008, 2009 and 2010.

Dloski and Marmon discussed settlement and reached a verbal agreement to lower the assessment. The parties agreed to lower the taxable value of the property by

\$3,600 for 2007, \$103,600 for 2008, \$413,150 for 2009 and \$508,910 for 2010.¹

Marmon prepared a stipulation to enter a consent judgment which Mr. Dloski signed. (16a-17a). The Tax Tribunal entered the consent judgment on April 6, 2011. The consent provided that the refund check should be sent to Plaintiff's attorney and further provided:

The parties agree to mutually waive penalty and interest due from either party provided all taxes or refunds due and owing as a result of this Joint Stipulation shall be paid by the Petitioner within twenty-eight (28) days of any issuance of new tax bills or tax computations forwarded to Petitioner resulting from this stipulation.

The consent judgment was sent to the Macomb County Treasurer for calculation of the amount owing. Plaintiff did not pay the 2007, 2008, 2009 and 2010 taxes so there was no refund owing. On May 2, 2011, the Treasurer sent Plaintiff a revised tax bill based on the consent judgment along with a spreadsheet showing how the taxes were calculated. (Plaintiff's Complaint, Paragraph 10) (12a). The bill was for \$269,314.40 for the four years of delinquent taxes which included interest at the mandatory statutory rate of one percent per month and an administration fee as required by MCL 211.78a(3). On May 23, 2011, Plaintiff paid \$206,304.77, the amount Plaintiff calculated was owed without the mandatory statutory interest and fees.

On June 23, 2012, Plaintiff filed a complaint in Ingham County Circuit Court alleging mandamus against Defendant. A copy of Plaintiff's Complaint is attached, (10a). Plaintiff alleged that Defendant had a clear nondiscretionary duty to accept its payment as payment in full. Defendant filed an answer and affirmative defenses, (23a),

¹ These numbers are the difference between the original taxable value and the settled taxable value on the schedule to the consent judgment. (18a).

and a motion for change of venue. In his affirmative defenses Defendant contended that interest on delinquent taxes cannot be waived, the Circuit Court did not have jurisdiction to order the Macomb County Treasurer to violate his statutory duty to charge interest on delinquent taxes and the Tax Tribunal had exclusive jurisdiction to resolve disputes over tax bills.

Ingham County Circuit Court granted Defendant's motion to change venue to Macomb County finding that Defendant was not being sued as a state officer. (tr. 8/31/11 p 10). Upon being transferred to Macomb County Circuit Court this case was assigned to Justice David F. Viviano, who at the time was a Macomb County Circuit Court Judge. At a settlement conference on November 2, 2011 the parties agreed to file motions for summary disposition to be heard on January 30, 2012.

The parties filed cross motions for summary disposition and the Court heard argument on January 30, 2012. Defendant moved for summary disposition pursuant to MCR 2.116(C)(4),(8) and (10). Defendant argued that mandamus was not proper as there is no statutory authority to allow for the waiver of the mandatory statutory interest on the delinquent taxes owed by Plaintiff, the stipulation between Macomb Township and Plaintiff did not waive interest owed to Defendant on the delinquent taxes, and that the Circuit Court did not have jurisdiction to order mandamus as the Tax Tribunal has exclusive jurisdiction to decide a dispute over an alleged error in a tax bill. A copy of Defendant's motion for summary disposition is attached (27a).

The transcript for the hearing on the motions for summary disposition is attached as (84a-116a). At the hearing, it was established that the Charter County of Macomb has a delinquent tax revolving fund pursuant to MCL 211.87b and when Plaintiff did not

pay the taxes while the appeal was pending, Defendant paid the taxes to the township, school districts and state. (tr. 1/30/12, pp 7-9) (90a-92a). Defendant contended that interest on the undisputed delinquent taxes cannot be waived and the settlement stipulation by its express terms only waived interest payments between the parties, the Township and Plaintiff, and only to the portion of the assessment that was changed by the Tribunal. (tr. 1/30/12, pp 23-25) (106a-108a). Defendant noted that the interest and fees were mandatory on taxes unless there was a specific statutory exception and the few statutory exceptions did not apply to the circumstances of this case. (tr. 1/30/12 pp 24-25) (107a-108a). Defendant also pointed out that if Plaintiff had fully prevailed in the tax appeal, it would receive a refund of about \$77,000; however, under Plaintiff's interpretation of the settlement agreement to include the waiver of interest on the undisputed portion of delinquent taxes, Plaintiff would receive \$109,000; \$32,000 more than it asked for. (tr. 1/30/12, p 23) (106a).

Plaintiff argued that Defendant could have joined the tax appeal but chose not to do so. (tr. 1/30/12, pp 13-14) (96a-97a). Plaintiff's counsel claimed that the waiver of interest and administrative fee was a consideration in reaching the consent agreement with Macomb Township because of his client's financial condition, (tr.1/30/12, p 4) (87a), but later admitted that he was unaware of the extent to which the taxes had not been paid when he negotiated the settlement agreement with the Township's attorney and admitted he did not know, "they hadn't paid anything on any year". (tr. 1/30/12 pp 21-22) (104a-105a). Plaintiff's counsel also did not consider adding Defendant as a party to the Tax Tribunal case. (tr. 1/30/12, pp 27-28) (110a-111a). Plaintiff's counsel also indicated, the "Michigan Tax Tribunal has authority to make any decision it wants

regarding taxes on property, and that includes waiving interest." (tr. 1/30/12 p 25)

(108a).

After studying the motions and hearing argument, Justice Viviano ruled in favor of Defendant:

Well, I think in this case that the, I agree the County and counsel agrees that the County is without statutory authority to waive the interest that's due. And so I don't need to get to the issue of whether or not the Tax Tribunal had jurisdiction to enter the order, because I think the order and the stipulation can be construed in a manner that's consistent with State law, and that is that it's, applies only to the parties to the action. And when it refers to the parties it means what it says, the parties to the tax appeal, and that those parties agree to mutually waive penalty and interest due from either party, again, party to the Tax Tribunal appeal. And it was not made explicit that it was intended to go further and bind Macomb County, nor do I think the Macomb Township has the authority in this capacity to bind Macomb County, certainly not on issues where it's not, it doesn't stand in the same shoes as the County. And, and I don't believe the Tax Tribunal order, to the extent that the argument is that they can order the County to waive interest, and that's an issue of first impression. I'm not persuaded that the issue should be decided in favor of the Plaintiff. But I don't think I have to reach that issue. I think I can base the Court's decision on the interpretation of the agreement between the parties and the consent judgment that was issued by the Tax Tribunal as a result. (tr. 1/30/12 pp 30-31) (113a-114a).

The Lower Court declined to consider Defendant's argument that the Circuit Court did not have jurisdiction to consider this matter and only granted Defendant's motion pursuant to MCR 2.116(C)(8) and (10). (tr. 1/30/12, p 31) (114a).

Plaintiff then appealed to the Court of Appeals as of right. The Court of Appeals reversed Justice Viviano finding that, despite the fact that the interest on the delinquent taxes was solely owing to Macomb County, Macomb Township and Macomb County

were in privity because they "work hand in hand in collecting taxes". *Sal Mar Royal Village*, 301 Mich App at 241. Despite the fact that MCL 211.78a(3) provides that interest at the rate of one percent a month or fraction of a month "shall" be added to delinquent taxes, the Court of Appeals found that a county treasurer or the Tax Tribunal could waive interest on delinquent taxes because there was no statutory authority preventing the Tribunal or the county treasurer from doing so. *Id* at 242-243. The Court of Appeals determined that Plaintiff's motion for summary disposition should have been granted and the Circuit Court should have issued an order of mandamus ordering Defendant to not collect the interest and fees required by MCL 211.78a(3).

Defendant then sought leave to appeal to this Court and raised the issue of jurisdiction in light of this Court's decision in *Hillsdale County Senior Servs v County of Hillsdale*, 494 Mich 46; 832 NW2d 728 (2013), which was decided one day after the Court of Appeals issued its decision in this matter. On November 20, 2013, this Court remanded this case to the Court of Appeals for consideration of whether Plaintiff's complaint for mandamus was within the exclusive jurisdiction of the Tax Tribunal. On February 25, 2014, the Court of Appeals issued an opinion on remand finding that Plaintiff's complaint for relief did not fall under the exclusive jurisdiction of the Tax Tribunal. On April 23, 2014, this Court granted Defendant's application for leave to appeal.

ARGUMENT

I

THE COURT OF APPEALS CLEARLY ERRED IN DETERMINING THAT INTEREST AND ADMINISTRATION FEES FOR DELINQUENT TAXES ASSESSED PURSUANT TO MCL 211.78a(3) CAN BE WAIVED IN A MICHIGAN TAX TRIBUNAL PROCEEDING WHERE THE COUNTY TREASURER WAS NOT A PARTY

A. Standard Of Review.

Defendant is contending the Court of Appeals erred in reversing Justice Viviano's decision to grant Defendant's motion for summary disposition. This issue also involves interpretation of MCL 211.78a(3) and other statutes affecting tax collection. This Court reviews de novo the grant or denial of a motion for summary disposition and questions of statutory interpretation. *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98, 105; 825 NW2d 329 (2012).

B. Summary Of Argument.

The Court of Appeals found that MCL 211.78a(3), which provides that twelve percent annual interest and an administration fee of four percent shall be added to real property taxes when they become delinquent, is not mandatory because "there is no statutory provision preventing the county from waiving this requirement." 301 Mich App at 242. In doing so, it created a new rule of statutory construction that conflicts with rule approved by this Court. Pursuant to the Court of Appeals new rule of statutory construction, the language in MCL 211.78a(3), which is clear and unambiguous, does

not need to be followed because there is no statutory provision preventing public officials from not following it. Contrary to the logic of the Court of Appeals, this Court has followed a plain and simple rule of statutory constructions that starts with the language of the statute and if it is clear and unambiguous, it is followed.

The legislature set the rate of interest on delinquent taxes to cover the cost of collection and then created very limited exceptions for residential property. The legislature is also currently reviewing this issue and there are several pending bills regarding interest in tax administration. These exceptions and bills show that if the legislature intended MCL 211.78a(3) to be discretionary it would have used "may" instead of "shall" or it would have not set a specific rate for interest or fees and instead have said "up to" or "or lower than" as shown by the pending bills. The two established exceptions apply to residential property. One waives interest for a few months for the disabled, elderly or veterans, and the other waives interest on a small portion of the assessment if the assessor commits an error. The Court of Appeals disregarded the legislature's control of this issue and made MCL 211.78a(3) completely discretionary. These statutory exceptions and pending bills also show that the legislature does not agree with the Court of Appeals' interpretation of MCL 211.78a(3).

The Court of Appeals also held that a provision in the Tax Tribunal Act that allows the Tribunal to grant other relief it deems necessary or appropriate, allows the Tribunal to disregard the mandatory requirements in MCL 211.78a(3). The Tribunal's powers are limited by statute and proper authority establishes that it would only have authority to waive interest on delinquent taxes if the statute imposing interest allowed for such discretion.

C. MCL 211.78a(3) Mandates That Interest Be Charged On Delinquent Property Taxes From The Date The Taxes Went Delinquent.

The Court of Appeals determined that the Tax Tribunal could waive interest on delinquent real property taxes:

Defendant also argues that the MTT did not have the authority to waive interest on the delinquent taxes. However, there is no statutory authority that prevents the MTT from doing so. *Sal Mar*, 301 Mich App 242.

The Court of Appeals made a similar conclusion with regard to a county treasurer's ability to waive interest on delinquent taxes:

Further, although defendant argues that MCL 211.78a(3) directs the county to charge interest on delinquent taxes, there is no statutory provision preventing the county from waiving this requirement. *Id.*

The Court of Appeals clearly erred in their interpretation of MCL 211.78a(3) as the statute mandates that interest and an administration fee be charged on delinquent taxes. MCL 211.78a(3) provides that if property taxes remain unpaid on March 1 of the year after they are assessed:

(3) A county property tax administration fee of 4% and interest computed at a noncompounded rate of 1% per month or fraction of a month on the taxes that were originally returned as delinquent, computed from the date that the taxes originally became delinquent, **shall** be added to property returned as delinquent under this section. [emphasis added].

This Court summarized the rules of statutory construction in *People v McIntire*, 461 Mich 147, 152-153; 599 NW2d 102 (1999):

Because our judicial role precludes imposing different policy choices than those selected by the Legislature, our

obligation is, by examining the statutory language, to discern the legislative intent that may reasonably be inferred from the words expressed in the statute. *White v Ann Arbor*, 406 Mich 554, 562; 281 NW2d 283 (1979). A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993). When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995); *Lake Angelus v Oakland Co Rd Comm*, 194 Mich App 220, 224; 486 NW2d 64 (1992). Finally, in construing a statute, we must give the words used by the Legislature their common, ordinary meaning. MCL 8.3a; MSA 2.212(1).

These traditional principles of statutory construction thus force courts to respect the constitutional role of the Legislature as a policy-making branch of government and constrain the judiciary from encroaching on this dedicated sphere of constitutional responsibility. Any other nontextual approach to statutory construction will necessarily invite judicial speculation regarding the probable, but unstated, intent of the Legislature with the likely consequence that a court will impermissibly substitute its own policy preferences. See *Cady v Detroit*, 289 Mich 499, 509; 286 NW 805 (1939) ("Courts cannot substitute their opinions for that of the legislative body on questions of policy").

The Court of Appeals did not interpret MCL 211.78a(3) pursuant to these well-established principles. MCL 211.78a(3) uses the mandatory term "shall". The legislature's use of the term "shall" "indicates a mandatory and imperative directive. *Stand Up For Democracy v Sec'y of State*, 492 Mich 588, 602; 822 NW2d 159 (2012).

By using the term "shall" in MCL 211.78a(3) the legislature created a mandatory and imperative directive that interest and an administration fee must be added to delinquent taxes. The legislature clearly intended for strict conformity so that all taxpayers were treated the same. Likewise, the late payment of delinquent taxes

causes extra expenses on local governments and the legislature clearly intended that these expenses be paid for by the delinquent taxpayer and not the general population. Finally, strict application of an administration fee and interest on delinquent taxes encourages the timely payment of taxes.

The Court of Appeals committed reversible error by ignoring the mandatory language in MCL 211.78a(3) and substituting its own policy preference to make interest and fees on delinquent property taxes discretionary. Such a policy decision is within the exclusive power of the legislature.

D. The Power To Establish When Interest Will Be Charged Resides With The Legislature.

It is well recognized that the legislature has the power to establish the rate of interest on delinquent taxes. *Webster v Auditor General*, 121 Mich 668, 674; 80 NW 705 (1899). In *Webster*, this Court recognized that it is the duty of the landowner to pay taxes when they become due and noted that the state's power to enforce payment was incidental to the power to tax. *Id.* In *Webster* this Court considered a legislative amendment that increased the interest on delinquent taxes to one percent a month or fraction thereof as the state was incurring a large deficit from the cost of collecting delinquent taxes. *Id.* at 671. Considering the reason for the increase, this Court found the amendment was retroactive and denied a writ of mandamus to lower the interest rate and noted it was within the power of the legislature to change the interest rate of the petitioner in that case and all others in his position. *Id.* at 674. Since then, the legislature has kept the same interest rate and administration fee on delinquent taxes as

currently codified in MCL 211.78a(3).

In light of the purpose for charging interest on delinquent taxes the legislature has considered and adopted limited exceptions to the interest requirement of MCL 211.78a(3). The fact that the legislature created these exceptions is strong evidence that it intended for interest and administration fees to be paid unless the circumstances met one of these exceptions. None of these exceptions apply to this case.

There is an exception for a limited waiver of interest on delinquent taxes for senior citizens, the disabled or eligible veterans. MCL 211.59(3) provides:

(3) For taxes levied before January 1, 1999, and for taxes levied after December 31, 1998, a county board of commissioners, by resolution, may provide all of the following for taxes paid before May 1 in the first year of delinquency for the principal residence of a senior citizen, paraplegic, hemiplegic, quadriplegic, eligible serviceman, eligible veteran, eligible widow, totally and permanently disabled person, or blind person, as those persons are defined in chapter 9 of the income tax act of 1967, 1967 PA 281, MCL 206.501 to 206.532, if either a claim is made before February 15 for the credit provided by chapter 9 of the income tax act of 1967, 1967 PA 281, MCL 206.501 to 206.532, if that claimant presents a copy of the form filed for that credit to the county treasurer, and if that claimant has not received the credit before March 1; or if a claim was made in the immediately preceding tax year for the credit provided by chapter 9 of the income tax act of 1967, 1967 PA 281, MCL 206.501 to 206.532, and if that claimant resides at the same principal residence as claimed in the immediately preceding tax year:

(a) Any interest, fee, or penalty in excess of the interest, fee, or penalty that would have been added if the tax had been paid before February 15 is waived.

(b) Interest paid under subsection (1) or section 89(1)(a) is waived unless the interest is pledged to the repayment of delinquent tax revolving fund notes or payable to the county delinquent tax revolving fund, in which case the interest shall be refunded from the general fund of the county.

(c) The county property tax administration fee is waived.

Basically, MCL 211.59(3) allows for a limited waiver of interest on delinquent taxes when the owner of a homestead qualifies for the homestead tax credit on their state income taxes. The interest waiver is only until the first of May in the first year of delinquency as a timely filed application for the homestead credit should be paid back to the homeowner by then and the homeowner can use the credit to pay his or her taxes. As taxes become delinquent on the first day of March in the year after they are assessed, this waiver is for only two months of the interest provided for in MCL 211.78a(3).

In MCL 211.59(3) the legislature also recognized that if there is a delinquent tax revolving fund, the interest that was waived would be reimbursed to the fund by the general fund of the county. Counties can create a delinquent tax revolving fund pursuant to MCL 211.87b. The revolving fund is created with county funds or borrowed funds through bond issues and is used to pay local units of government their portion of the delinquent taxes after the tax roll is settled pursuant to MCL 211.55. MCL 211.87b(3). The fund is then used to pay the local municipalities the delinquent taxes when the tax roll is settled. The obvious purpose of the delinquent tax revolving fund is to provide stability to local government finances. If there is no revolving fund, delinquent taxes and accumulated interest are paid to the local units as they are collected pursuant to MCL 211.87.

Pursuant to Paragraph 6 of the Revolving Fund Act:

(6) The interest charges, penalties, and county property tax administration fee rates established under this act shall remain in effect and shall be payable to the county delinquent tax revolving fund. MCL 211.87b(6).

The interest that is paid to the revolving fund pursuant to MCL 211.87b(6) is used

to replenish the balance in the fund so that it can pay bondholders if notes are issued and to maintain a healthy balance to protect local communities if the amount of delinquencies increase. Accordingly, the legislature wisely protected the balances of county delinquent tax revolving funds from this limited waiver of interest.

The legislature also created a limited waiver for interest under certain circumstances when a Principal Residence Exemption (PRE) had been improperly claimed on a property. MCL 211.7cc(8) allows the Department of Treasury to waive interest and penalty:

The department of treasury may waive interest on any tax set forth in a corrected or supplemental tax bill for the current tax year and the immediately preceding 3 tax years if the assessor of the local tax collecting unit files with the department of treasury a sworn affidavit in a form prescribed by the department of treasury stating that the tax set forth in the corrected or supplemental tax bill is a result of the assessor's classification error or other error or the assessor's failure to rescind the exemption after the owner requested in writing that the exemption be rescinded.

Again, this exemption has very limited application as the PRE only affects a fraction of the assessment on a home and there are a limited number of PRE denials due to assessor's errors. The State Tax Commission issued a memorandum stating its interpretation of this exemption noting that:

The Department [State Tax Commission] is the only entity authorized to waive interest. The Board of Review, local unit officials, county officials, Michigan Tax Tribunal, and any other person or entity **do not** have statutory authority to waive interest in a corrected or supplemental tax bill resulting from a PRE denial. State Tax Commission Memo, "Principal Residence Exemption Public Act 17 of 2010 Amendments Waiver of Interest and Timber-Cutover Classified Property", March 26, 2010, (129a), (emphasis in original).

The State Tax Commission's opinion is at odds with the Court of Appeals decision in this case as the Commission clearly thinks that interest on delinquent taxes may not be waived unless there is a specific statutory exception. The Commission also clearly takes a strict view on such exceptions. This Court accords respectful consideration for an agency's statutory interpretation. A court reviewing an administrative agency's interpretation of a statute should give the agency's interpretation "respectful consideration". *Great Wolf Lodge of Traverse City, LLC v PSC*, 489 Mich 27, 37; 799 NW2d 155 (2011).

The legislature is also actively regulating interest on delinquent taxes and delinquent tax revolving funds. There are seven bills pending in this current legislative session that would affect interest on property tax administration.

Senate Bill 632 would cut the rate of interest on delinquent taxes in half. The bill would change the interest rate on delinquent taxes in MCL 211.78a(3) from one percent per month to one-half percent per month.

Four bills would allow for waiver of additional forfeiture interest. If delinquent taxes are not paid within a year they are forfeited on the subsequent first day of March and the interest rate is increased by one half percent per month retroactively. MCL 211.78g(3)(b). Basically this increases the delinquent tax rate from 12% to 18% upon forfeiture.

It should be noted that there are existing exemptions from forfeiture, and one of the exceptions is for taxes that are on appeal to the Michigan Tax Tribunal. MCL 211.78g(1) grants the State Tax Commission the authority to determine when a county treasurer shall withhold a parcel from forfeiture and the procedures the county treasurer

must follow. The State Tax Commission's procedures are in State Tax Commission Bulletin 9 of 2011. (131a). Paragraph 4 of the bulletin provides that if property is subject to a tax appeal a county treasurer must set aside a forfeiture for the tax years on appeal. Accordingly, the forfeiture fees and additional interest are not charged if the taxes are on appeal. (132a)

Senate Bill 388 and House Bill 4409 would allow county treasurers to waive the additional interest on forfeiture for residential homestead property if the owners were determined to be suffering a hardship as determined pursuant to MCL 211.78h. MCL 211.78h(3)(a) provides that the county treasurer may withhold property from foreclosure if it is owned by minor heirs or persons who are incompetent, persons without means of support, or persons unable to manage their affairs due to age or infirmity, until a guardian is appointed to protect that person's rights and interests. MCL 211.78h(3)(b) allows a county treasurer to withhold property from foreclosure when the owner is undergoing a substantial financial hardship as determined by a written policy of the county treasurer which reviews household income considering the federal poverty guidelines.

Senate Bill 632 would not provide for additional interest on forfeiture. House Bill 4882 would allow for the additional forfeiture interest to be waived in financially distressed communities.

Two bills, which recently became public acts, affected interest a county treasurer who controls a delinquent tax revolving fund may charge to local communities on charge backs of uncollected taxes. MCL 211.87b(1) provided that if delinquent taxes were not collected for any reason, the local units had to repay the delinquent taxes to

the revolving fund with interest at the rate of one percent per month or fraction thereof. This provision was rarely used until the recent financial crisis. As communities were beginning to get billed for large charge backs they approached their legislators to ask for relief and House Bill 5074 was enacted as 2014 PA 33, which provided that interest owed by the local community on a charge back was "up to 1% per month or fraction of a month."

The language used by the legislature in 2014 PA 33 clearly gave the county treasurer discretion as to how much interest should be charged, up to 1% per month or fraction thereof. This should be compared to what the Court of Appeals did to the language of MCL 211.78a(3) in this case. The Court of Appeals rewrote MCL 211.78a(3) to provide that interest on delinquent taxes can be charged "up to" 1% per month or fraction thereof. This clearly is a legislative function as shown by HB 5074.

In any event, HB 5074 was short lived as Senate Bill 562 was subsequently enacted as 2014 PA 126 which provides that the interest rate on a charge back to a delinquent tax revolving fund is 1% per month or fraction thereof or a lower rate as determined by the county board of commissioners.

The legislature clearly thinks that interest on delinquent taxes is mandatory unless the property owner qualifies for one of the limited statutory exceptions it creates. The Court of Appeals clearly erred in failing to recognize that the term "shall" in MCL 211.78a(3) makes the imposition of interest mandatory unless the property owner qualifies for one of the limited statutory exceptions. All of the recognized statutory exceptions to mandatory interest on delinquent taxes have limited application. The language the legislature would use if it intended for interest to be discretionary is clearly

shown in the recent bills. According to the scheme adopted by the legislature and the State Tax Commission, delinquent taxes that are on appeal to the Michigan Tax Tribunal are subject to interest and administration fee pursuant to MCL 211.78a(3) but not the additional forfeiture interest and fee pursuant to MCL 211.78g and the State Tax Commission's regulation that is authorized by MCL 211.78g(1). The Court of Appeals in this case clearly infringed on the legislature's authority to regulate this area and misread MCL 211.78a(3) by finding that there was no provision preventing a county or the Tax Tribunal from waiving interest and fees on delinquent taxes.

E. The Court of Appeals Clearly Erred In Finding The Tax Tribunal Had General Power To Waive Statutorily Mandated Charges.

The Court of Appeals found that the Tax Tribunal had the power to waive mandatory interest and administration fees owed on properly assessed delinquent taxes pursuant to MCL 205.732 which states:

The tribunal's powers include, but are not limited to, all of the following:

(a) Affirming, reversing, modifying, or remanding a final decision, finding, ruling, determination, or order of an agency.

(b) Ordering the payment or refund of taxes in a matter over which it may acquire jurisdiction.

(c) Granting other relief or issuing writs, orders, or directives that it deems necessary or appropriate in the process of disposition of a matter over which it may acquire jurisdiction.

There is no question the Tax Tribunal had jurisdiction to determine the proper level of assessment for Plaintiff's property in this case. This case involves the extent of

the Tribunal's powers to enter other orders not related to the level of assessment.

The Tax Tribunal is an administrative agency. Administrative agencies are created by the legislature and their powers are limited to those which the legislature chooses to delegate to them through statute. *York v Detroit (After Remand)*, 438 Mich 744, 767; 475 NW2d 346 (1991). The statutory language conferring such powers must be "clear and unmistakable" and is subject to "strict interpretation." *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 583; 810 NW2d 110 (2011). It is possible for an administrative agency to possess implied powers only when that authority is "'necessary to the due and efficient exercise of the powers expressly granted' by the enabling statute." *Id.* at 586, quoting *Ranke v Corp & Securities Comm*, 317 Mich 304, 309; 26 NW2d 898 (1947).

Tax Tribunal's powers are limited to those authorized by statute. *Federal-Mogul Corp v Dep't of Treasury*, 161 Mich App 346, 359; 411 NW2d 169 (1987). The Tax Tribunal Act provides specific procedures for interest on its orders. MCL 205.737(4) provides:

A sum determined by the tribunal to have been unlawfully paid or underpaid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to date of its payment. However, a sum determined by the tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the tribunal's decision.

To understand this statute, reference must be made to the general rule in the Tax Tribunal that the taxes must be paid prior to entry of the Tax Tribunal's order. MCL 205.743(1) provides:

(1) If the date set by law for the payment of taxes has passed, the tribunal shall not make a final decision on the

entire proceeding until the taxes are paid. This requirement may be waived at the tribunal's discretion.

MCL 205.743(1) is clear and unambiguous. It only allows the Tribunal to waive payment of taxes prior to entry of an order. It does not grant the Tax Tribunal power to waive mandatory statutory interest on delinquent taxes. If the legislature had intended to allow the Tribunal to allow entry of a final order without payment of taxes and interest it would have put such language in MCL 205.743(1). As previously noted the legislature has adopted and is currently considering limited exceptions that would allow waiver of interest on delinquent taxes. The legislature chose not to put such an exception in the Tax Tribunal Act. The judiciary's role is to enforce the clear language of the statute, not to substitute its policy preferences. *McIntire, supra*.

The Tax Tribunal Act does provide for a limited waiver of the administration fee. MCL 205.737(4) states:

The tribunal shall order the refund of all or part of a property tax administration fee paid in connection with taxes that the tribunal determines were unlawfully paid.

A refund of an administration fee on taxes that were unlawfully paid would be based on the taxes paid on the portion of the assessment the Tribunal determined to be excessive. As Plaintiff in this case did not pay the taxes prior to the entry of the consent judgment in the Tribunal, this exception does not apply to this case. As the Tax Tribunal Act only provides for the waiver of administration fee on the amount unlawfully paid, the Court of Appeals erred in this case finding that the Tribunal could order the waiver of the administration fee on the taxes that were lawfully assessed when the taxes were not paid.

In contrast to these specific statutory provisions in the Tax Tribunal Act regarding

interest and administration fee, the Court of Appeals in this case relied on MCL 205.732(c) which grants the Tribunal the authority to grant relief it deems necessary or appropriate in disposing of a matter. The settled rule regarding statutory construction is that a specific statutory provision controls over a related but more general statutory provision. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 368 n 22; 817 NW2d 504 (2012). There is also no showing that a waiver of mandatory interest on lawfully assessed taxes was necessary or appropriate in this case.

Under the Court of Appeals interpretation of MCL 205.732(c) the General Property Tax Act and the statutes governing the Tax Tribunal are mere suggestions that the Tribunal can disregard. Such an interpretation of MCL 205.732(c) does not recognize the limits on the role of the Tribunal as recognized in *York, supra*.

The legislature gave the Tax Tribunal specific procedures to follow with regard to interest on taxes. MCL 205.737(4) provides for the manner the Tax Tribunal is to handle interest in its orders. MCL 205.743(1) governs how the Tribunal may handle situations in which the petitioner did not pay the taxes prior to entry of a final order. In enacting these provisions the legislature set its policy as to how these matters should be handled. In MCL 205.737(4) the legislature clearly granted the Tribunal authority to impose interest on taxes that were underpaid or overpaid as the result of the Tribunal's determination of the proper level of the assessment. The legislature did not grant the Tribunal power to waive interest over the portion of the taxes that were lawfully assessed. In MCL 205.737(4) the legislature only granted the Tribunal the power to waive the administration fee on taxes that were unlawfully paid. It did not grant the Tribunal the authority to waive administration fee on taxes that were unlawfully not paid.

The legislature also specified what the Tribunal may do when the taxes were not paid prior to the entry of a final order in MCL 205.743(1). The general provision in MCL 205.732(c) should not be interpreted to allow the Tribunal to subvert the legislature's clear intent as to how these matters should be handled.

An example on the restriction of the Tribunal's general powers in MCL 205.732(c) is found in *Federal-Mogul, supra*. In *Federal-Mogul*, the Tax Tribunal awarded interest on a franchise fee refund claim even though the governing statute did not provide for interest on refund claims. The Court of Appeals reversed noting that the judiciary's powers over statutory interest were limited:

It is well settled that the right to interest is purely statutory. *Detroit v Detroit Police Officers Ass'n*, 408 Mich 410; 294 NW2d 68 (1980), *app dis* 450 U.S. 903; 101 S Ct 1337; 67 L Ed 2d 326 (1981); *Fowler v Muskegon Co*, 340 Mich 522; 65 NW2d 801 (1954). This Court has quoted 47 CJS, *Interest*, § 5, p 17, with approval: "[The] legislature has the widest powers on the subject [of interest], and the will of the legislature controls except insofar as limitations are placed on this power by the organic law." *Davis v Howard*, 14 Mich App 342, 344; 165 NW2d 505 (1968), *lv den* 382 Mich 754 (1969). Statutes which allow interest, being in derogation of the common law, must be strictly construed. *Strauss v Elless Co*, 245 Mich 558; 222 NW 752 (1929); *Schwartz v Piper Aircraft Corp*, 90 Mich App 324, 326; 282 NW2d 306, *lv den* 407 Mich 892 (1979). *Federal Mogul*, 161 Mich App at 357-358.

The Court found that if the Tax Tribunal has authority to award interest, it must be a power authorized by statute and could not be authorized by the general powers of the Tax Tribunal under MCL 205.732(c). *Id.* at 366. Pursuant to the logic in *Federal-Mogul*, if the Tax Tribunal has the power to waive interest on lawfully assessed delinquent taxes, the power should be found in a specific statute allowing the waiver. MCL 205.732(c) should not be interpreted as allowing a waiver of the mandatory

interest required in MCL 211.78a(3).

The Court in *Federal-Mogul* also noted that MCL 205.732 did not grant the Tax Tribunal the general power to balance the equities and award interest since it has no equitable powers. *Federal-Mogul*, *supra* at 359. The Court of Appeals decision in this case appears to conclude that the Tax Tribunal has the power to balance the equities and waive interest on lawfully assessed delinquent taxes when there is no statutory authority to do so.

The Tax Tribunal has been presented with the opportunity to consider whether it had the authority to waive interest in *Mikelonis v Township of Alabaster*, MTT Docket No. 382898, March 21, 2011, (50a). *Mikelonis* dealt with MCL 211.7cc which allows the State Tax Commission to waive interest on a Principle Residence Exemption denial due to an assessor's error. The Tax Tribunal considered the State Tax Commission's memo, attached, (129a), which concluded that only the Tax Commission had the discretion to waive the interest pursuant to the statute.

The Tribunal did not find the power to review this issue under its general powers in MCL 205.732(c). Instead, it reviewed the specific statute, MCL 211.7cc, and found that since an appeal from the Commission's decision was to the Tribunal and the statute gave the Commission the discretion to consider a waiver of interest in specified circumstances, the Tribunal could consider whether the Commission properly exercised its discretion in deciding whether to waive the interest or penalty:

4. Contrary to Respondent's contentions, the Tribunal is not, in fact, precluded from "[waiving] interest in a corrected or supplemental tax bill resulting. . . [from] a PRE denial." MCL 211.7cc(8) provides for the denial of a principal residence exemption by Treasury, a request for informal conference with Treasury relative to that denial and the permissive

waiver of interest by Treasury for such denials. Treasury's determinations are, however, appealable to the Tribunal under MCL 211.7cc(13), including the denial of the permissive waiver, and the Tribunal can determine whether the waiver was appropriately denied or granted. See also MCL 205.753 (i.e., "[f]or purposes of the constitutional provision, the tribunal is the final agency for the administration of property tax laws"). *Mikelonis, supra*, pp 9-10. (53a).

In *Mikelonis* the Tribunal correctly noted that its role in reviewing a waiver of interest on taxes needs to be specifically authorized by statute and is limited to reviewing a denial of a waiver of interest by an agency that has specific statutory authority to waive interest. The Tribunal did not cite MCL 205.732(c) and did not hold that it had general equitable powers but instead relied on the specific statute allowing the Tribunal to review the Commission's decision to waive interest in MCL 211.7cc.

Likewise, in *Wagner v Department of Treasury (In re Wagner Estate)*, 224 Mich App 400, 401; 568 NW2d 693 (1997) the Court of Appeals found that a Probate Court could waive interest and penalties on estate taxes because the Department of Treasury had been given explicit statutory to do so in MCL 205.204(2) and the Probate Court was given authority pursuant to MCL 205.210 to review all questions arising under the inheritance tax act. Considering these statutes the Court concluded that probate courts can review the penalties assessed by the Department of Treasury to determine whether they were properly added or waived, as well as order the cancellation of penalties found upon judicial review to have been inappropriate.

The Court of Appeals recently distinguished *Wagner* in a case involving interest on real property taxes, *Director Workers Comp Agency v Macdonald's Indus Prods*, ____ Mich App ____ ; ____ NW2d ____ (March 27, 2014). In *Macdonald's* the Court of Appeals

rejected a receiver's argument that he could avoid interest and administration fees on real property taxes:

In re Wagner Estate is distinguishable because this case does not involve a provision of the Estate Tax Act and the statute at issue here does not provide the circuit court any discretion regarding the order of priority for payments from a receivership distribution. Here, as discussed above, MCL 600.5251 provides that the circuit court must first distribute the proceeds of a receivership to pay "[a]ll taxes legally due and owing" to municipalities. Further, MCL 600.5251 uses the word "shall." The word "shall" indicates a mandatory requirement and "expresses a directive, not an option." Thus, the circuit court did not have the discretion to vary this statutory mandate by resorting to equity. We conclude that the circuit court properly declined to forgive the interest and penalties as a form of equitable relief. Slip Op at p 28.

In the instant case the Court of Appeals found the Tax Tribunal could waive interest mandated by MCL 211.78a(3) on lawfully owing delinquent taxes, contrary to the clear language in MCL 211.78a(3) that the imposition of interest and administration fee is mandatory. The Court of Appeals in this case ignored the limited statutory exceptions that would allow the waiver of interest required by MCL 211.78a(3) and instead imposed its own policy preference to make a judicial blanket exception to MCL 211.78a(3). The Court of Appeals clearly erred in concluding that the Tribunal had the power to waive mandated statutory interest required by MCL 211.78a(3).

F. The Court Of Appeals Clearly Erred In Relying On MCL 211.44(4) To Claim A County Treasurer May Waive Interest And Fees On Delinquent Taxes.

After failing to recognize that the MCL 211.78a(3) is mandatory and incorrectly concluding that no statutory provision prevents a county from waiving interest on delinquent taxes the Court of Appeals stated:

And MCL 211.44(4) allows a local government unit that collects taxes to waive the administration fee and the penalty charge on late taxes. *Sal Mar*, 301 Mich App at 242-243.

MCL 211.44(4) has no application to this case as the statute would only apply to charges applied by Macomb Township before the taxes became delinquent. Based on the allegations in the Complaint, this case only involves interest on delinquent taxes pursuant to MCL 211.78a(3).

MCL 211.44(4) is in the tax collection section of the General Property Tax Act, MCL 211.1 *et seq.*, (GPTA) which governs the collection of current taxes before they become delinquent. The first sentence of MCL 211.44 provides that upon receipt of the tax roll the township treasurer or other collector proceeds to collect the taxes. In this case the tax roll was prepared by Macomb Township and the current taxes were collected by Macomb Township in accordance with this statute.

MCL 211.44(4) provides that the township board or city council can waive penalties and fees assessed by the city or township before the taxes become delinquent:

(4) The governing body of a local property tax collecting unit may waive all or part of the property tax administration fee or the late penalty charge, or both. A property tax administration fee collected by the township treasurer shall be used only for the purposes for which it may be collected as specified by subsection (3) and this subsection. If the bond of the treasurer, as provided in section 43, is furnished by a surety company, the cost of the bond may be paid by the township from the property tax administration fee.

MCL 211.44(4) provides for the waiver of the administration fee and three percent late penalty provided for in MCL 211.44(3). The administration fee and penalty in MCL 211.44(3) are not mandatory pursuant to the explicit terms of the statute:

Except as provided by subsection (7), on all taxes paid after February 14 and before taxes are returned as delinquent under section 78a(2) the governing body of a city or township **may** authorize the treasurer to add to the tax a property tax administration fee to the extent imposed on taxes paid before February 15 and the day that taxes are returned as delinquent under section 78a(2) a late penalty charge equal to 3% of the tax. [emphasis added.]

MCL 211.44 only applies to taxes collected by the township, in this case, Macomb Township. Plaintiff is not suing Defendant for waiver of the administration fee and penalty charged by the Township. Plaintiff's suit demands a mandamus order prohibiting the Macomb County Treasurer from collecting the interest and fees required by MCL 211.78a(3).

To further illustrate the Court of Appeals error in reliance on MCL 211.44, MCL 211.45 provides that the Township's role in collecting taxes ends when the taxes go delinquent:

All taxes shall be collected by the several township and city treasurers or collectors, before the first day of March, in each year.

Pursuant to MCL 211.45 the application of MCL 211.44 and Macomb Township's role in collecting the subject taxes ends on the last day of February of the year following the assessment. For example, in the case of the 2007 taxes, the deadline for collection by the Township was February 29, 2008, long before the settlement was reached in the tax appeal. Macomb Township's role in collecting the 2007 taxes in the subject case ended on February 29, 2008. Once the deadline in MCL 211.45 passes, the county treasurer is solely responsible for collecting the delinquent taxes pursuant to MCL 211.78a.

The Court of Appeals clearly erred as a matter of law in relying on MCL

211.44(4) to support its holding that a county may waive interest on delinquent taxes. MCL 211.44(4) only applies to the collection of current taxes before they become delinquent. Likewise, pursuant to MCL 211.44, the township only has authority to waive the charges the township may impose on taxes before they become delinquent. The Court of Appeals failed to recognize this and incorrectly concluded that MCL 211.44 authorizes a township to waive interest and fees that are mandated by MCL 211.78a(3) in a tax appeal where the county treasurer was not given notice of the claim for reduction of interest and was not a party to the tax appeal. The Court of Appeals conclusion is clearly erroneous as a matter of law, infringes on the role of the legislature, and will cause substantial confusion in the administration of the tax laws.

G. The Court Of Appeals Clearly Erred In Entering An Order Of Mandamus Ordering A County Treasurer To Waive Interest On Lawfully Assessed Taxes.

The standard for mandamus was described in *Tuggle v Mich Dep't of State Police*, 269 Mich App 657, 668 (2005):

The issuance of a writ of mandamus is proper where (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial and involves no exercise of discretion [or] judgment, and (4) no other remedy exists, legal or equitable, that might achieve the same result. Plaintiffs bear the burden of demonstrating entitlement to the extraordinary remedy of a writ of mandamus. [Citations and quotation marks omitted.]

The Court of Appeals in this case found that an order of mandamus should be entered prohibiting the Macomb County Treasurer from charging interest and administration fee on lawfully assessed delinquent taxes as required by MCL

211.78a(3). Mandamus is a remedy to cure a statutory violation *Belding v Maloney*, 360 Mich 336, 343; 103 NW2d 621 (1960). In this case, the Court of Appeals entered an order of mandamus directing the Macomb County Treasurer to violate MCL 211.78a(3) by directing him not to calculate Plaintiff's tax bill as mandated by the statute. This Court cannot and will not issue a writ of mandamus to compel a public official to act in violation of law or to enforce an illegal claim. *John Wittbold & Co v Ferndale*, 281 Mich 503, 509; 275 NW 225 (1937).

Pursuant to MCL 211.78a(3) Defendant had no discretion and was required to charge interest on the lawfully assessed delinquent taxes. Mandamus should not be used to order public officials to violate the law. The Court of Appeals clearly erred in granting Plaintiff's request to enter an order of mandamus in this case.

II

THE COURT OF APPEALS CLEARLY ERRED IN FINDING THAT THE MACOMB COUNTY TREASURER WAS IN PRIVITY WITH MACOMB TOWNSHIP FOR PURPOSES OF WAIVING INTEREST AND FEES UNDER MCL 211.78a(3)

A. Standard Of Review.

Defendant contends that the Court of Appeals clearly erred in reversing the Circuit Court and granting summary disposition to Plaintiff based on its interpretation of the stipulation between Macomb Township and Plaintiff in the tax tribunal appeal and in finding that Macomb Township and Defendant were in privity with regard to the waiver of interest. The Court of Appeals granted summary disposition in favor of Plaintiff pursuant to MCR 2.116(C)(10).

This Court reviews de novo orders granting summary disposition pursuant to

MCR 2.116(C)(10). *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). This Court also reviews questions involving interpretation of a consent judgment de novo. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003).

B. The Court Of Appeals Erred In Finding Privity Under The *Baraga* Standard.

The Circuit Court found that the first phrase in Paragraph 8 of the stipulation entered in the Tribunal specifically restricted its application to the parties as it began, “[t]he parties agree to mutually waive penalty and interest due from either party.” (tr. 1/30/12, p 30) (113a). The Circuit Court Judge noted that the agreement only referred to the parties to the tax appeal and did not specify that it was to bind government units not a party to the appeal such as Defendant. The Circuit Court Judge also found that Macomb Township lacked the authority to bind the Macomb County Treasurer to an agreement that would waive interest on lawfully assessed taxes as required by MCL 211.78a(3). (tr. 1/30/12, pp 30-31) (113a-114a).

The Court of Appeals reversed the Circuit Court finding that consent judgments are binding on all persons in privity with the parties to the former action. 301 Mich App 238-239. The Court of Appeals then found that Macomb Township and Macomb County work “hand in hand” when collecting taxes. 301 Mich App 241. However, the Court of Appeals failed to recognize the differing roles of the County and Township. In *Baraga County v State Tax Commission*, 466 Mich 264, 271-272; 645 NW2d 13 (2002) this Court found that it was error to focus on the similarities of the roles of the various units of government in carrying out the tax laws and instead should have focused on the differing roles of the parties at issue to determine whether there was privity between governmental units.

In *Baraga County* the state did not intervene in a tax appeal. The parties in the tax appeal agreed that certain property was exempt from taxation, contrary to published guidelines by the State Tax Commission. This Court held that the state was not bound by the consent judgment citing several reasons, including that there was no privity between the state and the local units that were parties to the appeal due to their differing roles. *Id.* at 271-272. This Court adopted a test for privity between governmental agencies:

A state may be bound by a judgment for or against a public officer, or agency, but only with respect to a matter concerning which he or the agency is authorized to represent it, and it is not bound by a judgment to which a subordinate political subdivision was a party in the absence of a showing that such political body had an interest in the litigation as a trustee for the state. *Id.* at 270, quoting 50 CJS, § 869, Judgments, p 443.

In this case, the Court of Appeals erred in its interpretation of the roles of Macomb County and Macomb Township. Without citing any statutory authority to support its conclusion the Court of Appeals indicated, "the township had authority to represent the county's interest in collecting taxes." *Id.* The Court then stated:

If there are delinquent taxes, they are turned over to the county treasurer, who pays the township the delinquent taxes with funds from the county's fully funded revolving tax fund. Then, the county collects the delinquent taxes with interest and fees from the property owner. This is unlike the situation in *Baraga County* where the township carried out the property tax laws and the state would step in only if the township failed to carry out its duties. *Baraga County*, 466 Mich at 271-272. Rather, here, the township receives the tax rolls from the county and then sends bills to the taxpayers. The county will automatically pay any taxes that the township is unable to collect. Accordingly, the county and the township work hand in hand in collecting taxes. Thus, the township and the county shared the same interest in the MTT litigation, which was to receive a fair assessment of the

value of the property in order to jointly collect the proper amount of taxes on the property. *Sal Mar Royal Village*, slip op p 9.

Contrary to the Court of Appeals conclusions, the statutory scheme for tax collection separates the roles of a township and county. First, the county does not prepare the tax roll. MCL 211.42 provides that the tax roll is prepared by the township supervisor and by State Tax Commission directive, the township assessor. Upon receipt of the tax roll the township treasurer bills and collects the "current" taxes. MCL 211.44(1). There are two due dates for "current" taxes in each year. MCL 211.44a(4) governs the summer tax levy and provides that the summer taxes are "due from the owner of that property on July 1." The winter taxes are due on December 1. *Bishop v Brown*, 118 Mich App 819, 825; 325 NW2d 594 (1982). The "due date" is synonymous with the billing date. The township's role in collecting taxes ends on the last day of February in the year after the taxes were assessed. MCL 211.45.

Taxes become delinquent on March 1 of the year preceding their assessment. MCL 211.78a(2). The collection of delinquent taxes is governed by the Tax Reversion Act, MCL 211.78 *et seq.* The Tax Reversion Act allows for a county to "opt out" and have the State collect the delinquent taxes. MCL 211.78(3)(a). Macomb County did not "opt out" and the Macomb County Treasurer is the Foreclosing Governmental Unit and is responsible for collecting the delinquent taxes. MCL 211.78(7)(a)(i).

A township has no role in the collection of delinquent taxes unless the county and township enter into an agreement pursuant to MCL 211.78(6). There is no agreement between Macomb County and Macomb Township for the collection of delinquent real property taxes.

MCL 211.78(6) further provides that if there is an agreement between the county and a township for the collection of delinquent taxes, the township may not establish a delinquent tax revolving fund. A delinquent tax revolving fund is under the sole control of the county treasurer.

Macomb County has a delinquent tax revolving fund. MCL 211.87b(2) makes the county treasurer the exclusive agent for managing the delinquent tax revolving fund:

(2) If a delinquent tax revolving fund is established, the county treasurer shall be the agent for the county and, without further action by the county board of commissioners, may enter into contracts with other municipalities, this state, or private persons, firms, or corporations in connection with any transaction relating to the fund or any borrowing made by the county pursuant to section 87c or 87d, including all services necessary to complete this borrowing.

Pursuant to MCL 211.87b(6) interest and fees owing on lawfully assessed delinquent taxes is property of the delinquent tax revolving fund:

(6) The interest charges, penalties, and county property tax administration fee rates established under this act shall remain in effect and shall be payable to the county delinquent tax revolving fund.

The Court of Appeals failed to distinguish between the roles of the township and county in assessing and tax collection. Macomb Township assessed Plaintiff's property and the tax appeal was a challenge to that assessment. Macomb Township's role in collecting the taxes at issue in this case ended prior to entry of the consent judgment in the tax appeal as the taxes were delinquent at that time. Macomb Township could not be the "trustee" for the county treasurer as there is no provision in the tax reversion section of the GPTA for the Township to have this role absent an agreement pursuant to MCL 211.78a(6). The Court of Appeal's summary of the similarity of the roles of

Macomb Township and the Macomb County Treasurer was not based on the procedures adopted by the legislature in the GPTA and was clearly erroneous. In applying the standard for privity in *Baraga*, Macomb Township was only authorized to defend the level of assessment on the property, was not authorized to represent Macomb County in the collection of delinquent taxes and was not a "trustee" of the county's delinquent tax revolving fund. The Circuit Court applied the proper standard in this case. The Court of Appeals did not and should be reversed.

C. The Court Of Appeals Erred In Finding Privity Under The *Adair* Standard.

The Court of Appeals also looked to the standard to determine privity in *Adair v State*, 470 Mich 105, 122; 680 NW2d 386 (2004). In *Adair*, this Court stated:

To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. The outer limit of the doctrine traditionally requires both a 'substantial identity of interests' and a 'working functional relationship' in which the interests of the nonparty are presented and protected by the party in the litigation. [citations omitted].

The Circuit Court in this case properly found that there was no identity of interest with regard to the relationship between the county and township to the interest on the properly assessed delinquent taxes as the interest was the sole property of the county. (tr. 1/30/12, pp 30-31) (113a-114a). The Court of Appeals, however, misapplied the privity test in *Adair* as it failed to properly distinguish the differing roles of the county and township.

In *Adair* this Court found that school districts that did not participate in *Durant v Michigan*, 456 Mich 175; 566 NW2d 272 (1997) were still bound by the decision because the decision equally benefitted all school districts and therefore the plaintiffs in

Durant adequately represented the interests of school districts that were not parties to the action. *Adair*, 470 Mich at 122.

In this case, with regard to the level of assessment there is privity under the *Adair* standard because the effect of the final determination of the assessment is born in the proper ratio of the respective millages of the state and local governments and the county treasurer will only be deprived of the interest on the portion of the taxes determined to be improperly assessed. However, to the extent that the stipulation in the Tribunal allegedly waives interest on lawfully owing delinquent taxes, there is no privity as the interest is solely owed to the county delinquent tax revolving fund. There is no substantial identity of interest or substantial working relationship between the county and township on interest solely owed to the county's delinquent tax revolving fund.

The Circuit Court in this case recognized that the interest on the properly assessed delinquent taxes was the sole property of the Macomb County Treasurer as custodian of Macomb County's delinquent tax revolving fund. See MCL 211.87b(6). The township has no authority to represent the county in collection of delinquent taxes and does not have any claim to the interest on the delinquent taxes that were properly assessed.

As noted in *Adair*, the interests of the parties need not be identical to establish privity, but there must be a "substantial identity of interests" that are represented and protected by the party, in this case Macomb Township, in the original proceedings. As admitted by the Plaintiff, the taxes on Plaintiff's property were reduced by approximately \$47,000 as a result of the settlement. (Plaintiff's brief in support of its motion for summary disposition, p 3) (58a). This loss in revenue was absorbed by the local

governments in equal proportion to their millages. The amount of interest the Court of Appeals determined to be waived by the Township was over \$60,000 and this loss was not shared by the other local governments. Basically, the Court of Appeals ruled that Macomb Township can force Macomb County to make a four year interest free loan to a property speculator because the Township assessed the Plaintiff's property too high.

The consent judgment as interpreted by the Court of Appeals did not affect the local governments proportionally. Whereas a county would normally be responsible for about ten percent of a refund, in this case with the waiver of interest, the county's loss is about sixty percent of the settlement. The loss of interest only affects the county's delinquent tax revolving fund. Macomb Township has no responsibilities with regard to the County's delinquent tax revolving fund. The Court of Appeals clearly erred in finding there was a substantial identity of interest. Under the standard for privity in *Adair*, this Court should agree with the Circuit Court and find there was no privity between Macomb County and Macomb Township.

D. The Possibility Of Intervention In The Tax Tribunal Proceedings Does Not Create Privity Between Macomb County And Macomb Township.

In response to Defendant's argument that the township did not share the same interests as the county, the Court of Appeals stated that if the county treasurer did not believe the township adequately protected the county's interest in the delinquent tax revolving fund the county treasurer could have intervened in the tax tribunal proceedings. 301 Mich App at 241-242. MCL 205.744 provides for intervention in Tax Tribunal proceedings:

- (1) Except for petitions filed under chapter 6, the tax tribunal

may permit the intervention or impleading of any governmental unit which receives tax funds from the petitioner who is making the appeal.

(2) If a petition is filed under chapter 6, the tribunal may permit the intervention or impleading of a state or local governmental unit or officer thereof or of any person or other entity upon a showing of a material monetary interest in the decision of the tribunal which is not likely to be adequately presented by the parties to the proceeding.

Tax Tribunal Rule 223, 2011 Michigan Admin Code, R 709.10223, provides for intervention in tribunal proceedings:

(7) The tribunal may, upon motion, order a person or, upon motion or its own initiative, order a state or local governmental unit to appear as amicus curiae or in another capacity as the tribunal considers appropriate.

Plaintiff, however, did not send notice to Defendant while the tax tribunal proceedings were pending that Plaintiff was requesting the interest to be waived on the lawfully owing delinquent taxes. Plaintiff's petitions in the Tax Tribunal requested a reduction in the assessment. As noted by this Court in *Baraga County*, it can hardly be expected for other government agencies to monitor the thousands of tax appeals being filed. 466 Mich at 275-276. This is especially true when a party in a tax appeal, such as Plaintiff in this case, attempts to create new law without notifying the affected parties.

Pursuant to R 709.10215 if the tribunal's rules do not cover an issue, the Michigan Court Rules apply. Plaintiff just named Macomb Township as the respondent in the tax tribunal proceedings and did not name the Macomb County Treasurer. The Tax Tribunal does not have a rule on necessary joinder so MCR 2.205 applies. When Plaintiff decided it would try to waive the interest on the lawfully owing delinquent taxes the Macomb County Treasurer became a necessary party. Pursuant to MCR 2.205(1) a necessary party must be joined in the action. The purpose of MCR 2.205 is to prevent

the splitting of causes of action and to ensure that all parties having a real interest in the litigation are present. *Mason County v Dep't of Cmty Health*, 293 Mich App 462, 489; 820 NW2d 192 (2011). As Plaintiff was requesting relief against the Macomb County Treasurer it was incumbent on the Plaintiff to file a motion to add the Macomb County Treasurer as a party.

Plaintiff's failure to join the Macomb County Treasurer as a party in the tax tribunal proceedings does not establish privity between Macomb Township and Macomb County. Plaintiff first notified the Macomb County Treasurer that it was claiming that interest on the lawfully delinquent taxes were waived after the tribunal order was entered and after the Defendant sent the bill to Plaintiff.

Plaintiff's failure to add Defendant as a necessary party in the tax tribunal proceedings does not create privity between Defendant and Macomb Township. Pursuant to *Baraga* and *Adair*, this Court should find that there was no privity between Defendant and Macomb Township regarding the interest on the delinquent taxes owing to Macomb County's delinquent tax revolving fund.

III

PLAINTIFF'S COMPLAINT FOR RELIEF FALLS UNDER THE EXCLUSIVE JURISDICTION OF THE MICHIGAN TAX TRIBUNAL PURSUANT TO MCL 205.731

A. Standard Of Review.

Whether a court has subject-matter jurisdiction is a question of law reviewed de novo. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 278; 831 NW2d 204 (2013). Issues of statutory interpretation are also reviewed de novo. *Id.*

B. Plaintiff's Complaint Challenges Defendant's Calculations On A Revised Tax Bill And Such Relief Is Within The Exclusive Jurisdiction Of The Tax Tribunal.

Plaintiff brought this action alleging that Defendant improperly included interest on delinquent taxes in a revised tax bill following the Tax Tribunal's reduction in taxable value and requested a writ of mandamus to accept Plaintiff's tendered payment as payment in full. (12a). Shortly after the Court of Appeals issued its original decision reversing the Circuit Court in this case, this Court issued its decision in *Hillsdale County Senior Servs, supra*. In *Hillsdale County Senior Servs* this Court found that the Tax Tribunal's exclusive jurisdiction is based on the subject matter of the dispute, not on the type of relief requested. 494 Mich at 60. In *Hillsdale* the plaintiff sought a writ of mandamus to compel a county board of commissioners to levy the full rate of an authorized millage. This Court found that pursuant to MCL 205.731(a), the board of commissioners was an agency and the allegations in the complaint were based on the amount of the millage levied, which this Court determined to be a "rate" and therefore the allegations in the complaint were within the exclusive jurisdiction of the Tax Tribunal. 494 Mich at 53-55.

This Court remanded this case for reconsideration in light of *Hillsdale*. On remand the Court of Appeals found that Plaintiff's complaint for relief did not fall under the exclusive jurisdiction of the Tax Tribunal. *Sal Mar, on remand*, (128a). This Court then granted leave to appeal on this issue.

MCL 205.731 provides for the Tax Tribunal's exclusive jurisdiction:

The tribunal has exclusive and original jurisdiction over all of

the following:

(a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under the property tax laws of this state.

(b) A proceeding for a refund or redetermination of a tax levied under the property tax laws of this state.

* * * *

(e) Any other proceeding provided by law.

The Court of Appeals determined that Plaintiff was attempting to enforce the tax tribunal consent judgment and Defendant raised the issue of the validity of the Tax Tribunal's authority to waive interest on delinquent taxes. (127a). The Court of Appeals failed to recognize that Plaintiff's Complaint specifically referred to the revised tax bill issued by Defendant pursuant to the tax tribunal consent judgment. In paragraph ten of the Complaint, Plaintiff alleged that following entry of the consent judgment in the Tax Tribunal, Defendant submitted a revised tax bill to Plaintiff on or about May 2, 2011. (12a). Plaintiff admitted this allegation in its answer and, therefore, it is undisputed for the purposes of this action that Plaintiff received a tax bill from Defendant on or about May 2, 2011. The subject matter of this lawsuit is Plaintiff's claim that Defendant should not have charged interest in the revised tax bill and should have accepted Plaintiff's tender of payment as payment in full. (12a).

The Court of Appeals, on remand, also failed to recognize that the Tax Tribunal has exclusive jurisdiction over claims regarding arithmetical errors or mistakes in tax bills. MCL 205.735a(6) provides:

An appeal of a contested tax bill shall be made within 60 days after mailing by the assessment district treasurer and the appeal is limited solely to correcting arithmetic errors or

mistakes and is not a basis of appeal as to disputes of valuation of the property, the property's exempt status, or the property's equalized value resulting from equalization of its assessment by the county board of commissioners or the state tax commission.

The Michigan Tax Tribunal has found this statute grants it jurisdiction to determine whether interest should be charged on a tax bill. In *Detroit Edison Company v City of Detroit*, MTT Docket Nos. 319829, 319830, 319831, 319832, 319833, 319834, 319840, 319841, 319842, 319844, 319845, 319847, 319848, 319869 and 319911, (April 5, 2011) (134a), a Detroit Public Schools millage was place on the Summer 2005 tax bill but the election for the millage was not held until November 8, 2005. (139a). Detroit Edison paid the bill in January 2006 but was charged interest. The Tax Tribunal found that since the tax was not authorized at the time the tax bill was sent, Detroit Public Schools was not authorized to charge interest for nonpayment. (149a). The Tax Tribunal found it had jurisdiction pursuant to MCL 205.735a(6):

The Tribunal finds the addition of interest and penalty to Petitioner's tax bill to be an arithmetic error or mistake pursuant to MCL 205.735. For this reason, the Tribunal finds that it has jurisdiction over this issue. (138a)

As noted by the Court of Appeals on remand, (slip op, p 4, n 3) (127a), and pursuant to MCL 205.731(a), Defendant is an "agency" and the issue raised by Plaintiff refers to "rates" as interest relates to the "amount of a charge". Plaintiff's Complaint alleges that Defendant did not charge the proper rate in the revised tax bill.

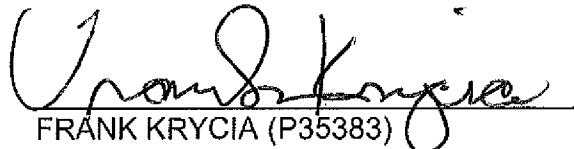
Circuit courts have general and original jurisdiction over all civil claims and remedies, except where the constitution or a statute denies the circuit court jurisdiction or vests exclusive jurisdiction in a different court. MCL 600.605; see also Const 1963, art 6, § 13; MCL 600.601. The Tax Tribunal has jurisdiction to consider a dispute over a

tax bill. MCL 205.731; MCL 205.735a(6). As such, the Tax Tribunal has exclusive jurisdiction over this matter, not the circuit court.

This Court should dismiss this matter pursuant to MCR 2.116(C)(4) as this action was brought in circuit court and the circuit court lacks subject matter jurisdiction over this dispute.

REQUEST FOR RELIEF

Defendant, the Macomb County Treasurer, requests this Court to reverse the decision of the Court of Appeals and find that summary disposition was properly granted to Defendant by the Circuit Court for the reasons stated in this brief and to dismiss this case.


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Dated: June 13, 2014